PRIVY COUNCIL REPORT

LIM YAM TEK & ANOR. v. PUBLIC PROSECUTOR

[P.C. (Lord Wilberforce, Lord Pearson, Lord Simon of Glaisdale, Lord Kilbrandon and Sir Edward McTiernan) June 5, 1972]

[Privy Council Appeal No. 5 of 1972]

Criminal Law and Procedure — Trial by jury — Summing up — Adequacy of — Whether principles of English Criminal Appeal Act, 1968, s. 2(1) applied here — Powers of Federal Court under Courts of Judicature Act, 1964, s. 60(1).

Privy Council — Principles which guide the Board in giving advice upon criminal matters.

This was an appeal against the decision of the Federal Court ([1971] 2 M.L.J. 17) dismissing an appeal against the conviction of the appellants on a charge of murder.

The main ground of appeal concerned the adequacy of the summing-up to the jury. It was alleged that the presiding judge had failed to make clear to the jury the place where the deceased died, being a crucial matter in estimating the credibility of the eye-witnesses to the crime who gave evidence for the prosecution.

Another ground of appeal raised was whether the Federal Court ought to have applied the principles of the English Criminal Appeal Act, 1968, section 2(1). The Federal Court had applied section 60(1) of the Courts of Judicature Act, 1964.

A further ground of appeal concerns the direction in the summing-up that the jury must approach the evidence for the prosecution and the evidence for the defence separately.

Held, dismissing the appeal: (1) the adequacy and critical examination of a summing-up is a matter for the Federal Court and not for the Board;

(2) it is outside the power of the Board to advise on the basis that an alteration in practice of the Federal Court either has been or ought to have been made.

Observations on the duty of the Board when advising the Head of an independent Sovereign State, under whose constitution the advice of the Board may be sought, upon matters of law, in cases which have come before the Supreme Court of that State, which itself has wide power in relation to criminal appeals, and which is different from the duty of the Board when having the oversight of the legal administration of subordinate parts of the Empire, in which, in the last resort, the civil and political administration was answerable to the British Parliament.

Advice to the jury to compartmentalise their approach is defective but the summing-up must be looked at as a whole

Cases referred to:-

(1) *Arnold* v. *The King-Emperor* [1914] A.C. 644 at p. 646.

(2) *The Falkland Islands Co.* v. *The Queen* (1863) 1 Moo. P.C. (N.S.) 299 at p. 312; 15 E.R. 713 at p. 718.

(3) *Muhammad Nawaz* v. *The King-Emperor* (1941) 68 I.A. at p. 126.

(4) *Ibrahim* v. *The King* [1914] A.C. 599 at p. 165.

(5) *R.* v. *Cooper* (1969) 53 Cr. App. R. 82.

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Roger Gray Q.C. and *Malcolm Stitcher* for the appellants.

Robert Gatehouse Q.C. and *N. P. Andreae-Jones* for the respondent.

Lord Kilbrandon (delivering judgment of the Board): Their Lordships gave the appellants leave to appeal against a judgment of the Federal Court of Malaysia, dismissing their appeal against a conviction of murder by the High Court at Ipoh. The jury had convicted by a majority of five to two, and on appeal the Chief Justice dissented from the judgment of the court. In one sense, therefore, the case is a narrow one, and that fact makes it all the more important to make, before coming to the actual grounds of appeal, a brief reference to the principles which guide the Board in giving advice upon criminal matters.

In *Arnold* v. *The King-Emperor*(1) Lord Shaw of Dunfermline, speaking of the power of the Royal authority to review proceedings of a criminal nature, said:

> "There are reasons, both constitutional and administrative, which make it manifest that this power should not be lightly exercised."

It may be that the revolution, since that date, in communications has made the administrative reasons less pressing; the constitutional position however has changed no less fundamentally, and has made it necessary to scrutinize the power of intervention no less narrowly. In 1863, Lord Kingsdown could say:

> "It may be assumed that the Queen has authority, by virtue of Her prerogative, to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the Colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended with success."

The Falkland Islands Company v. *The Queen*.(2)

The Board is not in this case concerned with advising on the review of the decisions of a colonial court. The Board is tendering advice to the Head of an independent Sovereign State, under whose constitution the advice of the Board may be sought, upon matters of law, in cases which have come before the Supreme Court of the country, which itself has wide power in relation to criminal appeals. This is very different from having the oversight of the legal administration of subordinate parts of the Empire, in which, in the last resort, the civil and political administration was answerable to the British Parliament. It is against this modern constitutional background that past declarations of policy must be considered.

These declarations, though unanimous in effect, are naturally expressed in the language selected by the makers of them. It would serve no purpose, but only confuse, to make an attempt to paraphrase or add to them. The jurisdiction of the Board has been stated in both a negative and a positive way. In *Muhammad Nawaz* v. *The King-Emperor*(3) the Lord Chancellor (Viscount Simon) said:

> "The Judicial Committee is not a revising court of criminal appeal: that is to say, it is not prepared, or required, to re-try a criminal case, and does not concern itself with the weight of evidence, or the conflict of evidence or with inferences drawn from evidence, or with questions as to corroboration or contradiction of testimony, or whether there was sufficient evidence to satisfy the burden of proof... The Judicial Committee cannot be asked to review the facts of a criminal case, or set aside conclusions of fact at which the tribunal has arrived."

Positively, his Lordship went on to say:

> "Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice. An obvious example would be a conviction following a trial where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses."

Further examples going to the constitution, impartiality or jurisdiction of the court are given.

Their Lordships are of opinion that, applying these principles, the present appeal cannot succeed upon any of the grounds on which it was supported.

The first, and main, ground is directed to the adequacy of the summing-up. In the appellants' case it is stated in the following words, "That the appellants' defence was not put to the jury." The substance of the complaint is that, the place where the deceased died being a crucial matter in estimating the credibility of the alleged eye-witnesses to the crime who gave evidence for the prosecution, the presiding judge failed to make this clear to the jury. As the Chief Justice put it in his dissenting judgment:

"They should have been asked the specific question: Did they believe that the deceased died among the theatre audience or outside the headman's house? On any proper analysis of the evidence, that was the decision required of the jury."

The passage is open to this criticism, that, while it was no doubt necessary for the jury to make up their minds as to the place of death in order that they might come to a conclusion on the credibility of the witnesses, this was not the decision required of them, being only a factor to be taken into account in arriving at that decision. And whatever the adequacy of the learned judge's presentation of the evidence relevant to that factor, it is not possible to say that he failed to put the appellants' defence to the jury. That defence was *alibi*, and of this the jury were made fully aware. But their Lordships do not think it proper to go into this question of the adequacy of the direction. This was a matter for the Federal Court. As Lord Sumner said, in *Ibrahim* v. *The King*,[4] speaking of the grounds upon which leave to appeal to the Board will be granted, or appeals allowed:

"Misdirection, as such, even irregularity, as such, will not suffice.... There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law...".

It would be impossible for the Board so to characterise what was, granted the validity of the criticism, no more than a defect in emphasis in a portion of a summing-up which, fairly regarded as a whole, lays the case properly before the jury.

A further ground of appeal raises the interesting legal question, whether the Federal Court ought to have applied, as the Chief Justice would have had them apply, the principles of the English Criminal Appeal Act 1968, section 2(1), which provides that the court shall allow an appeal if it thinks —

"That the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory."

Since no conviction can be unsafe or unsatisfactory if the prosecution case is proved beyond reasonable doubt, the effect of this provision is to empower the court to override the findings of a jury on a question which, until the provision had been made, was entirely a matter for them, namely, there being evidence which, if believed, was sufficient in law to justify a conviction, is the case proved beyond reasonable doubt? As Widgery L. J. put it in *Cooper*,[5] the court must ask itself —

"Whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done."

No equivalent statute has been passed in Malaysia.

The Federal Court had to apply the Courts of Judicature Act 1964, which provides by section 60(1) that on appeal the court may —

"...confirm, reverse or vary the decision of the trial court, or may order a retrial or may remit the matter with the opinion of the Federal Court thereon to the trial court, or may make such other order in the matter as it may seem just:";

there follows a proviso in the familiar form governing the case of "no substantial miscarriage of justice." The powers of the Federal Court are therefore much wider than were those of the Court of Criminal Appeal under the English Act of 1907. Moreover by section 4(1), the circumstances in which the English court could have set aside a conviction having been defined, the court was directed that they "in any other case shall dismiss the appeal." No such direction is given to the Federal Court.

Nevertheless, as the Chief Justice says in his judgment, it has always been the practice in the Malaysian court to follow the principles of section 4(1) of the 1907 Act. The question whether the Federal Court, in the event of the principles of the English Act of 1968 finding favour, could alter their practice in order to give effect to them, or whether the long-standing practice could only be changed by legislation, may be a difficult one. But in fact the Federal Court have not done so. Their Lordships have no doubt that it is outside the power of the Board to advise on the basis that such an alteration in practice either has been or ought to have been made.

A subsidiary criticism of the summing-up was directed to a passage in which the learned judge said:

"If therefore you are satisfied from the evidence of these prosecution witnesses that the deceased was stabbed by one or more of the four assailants named by (two witnesses), then the prosecution has proved a *prima facie* case against these two accused persons of the charge. If you are so satisfied then and only then you need consider the defence. But if at this stage you feel that you do not believe the evidence of (the witnesses) then you may straightaway return a verdict of not guilty against the accused without having to consider their defence."

Looked at in isolation, this advice is defective, in as much as it is not possible to evaluate the credibility of prosecution witnesses before weighing the effect, if any, on that credibility, of the evidence of the defence witnesses. But if the summing-up is looked at as a whole, with particular reference to the perfectly adequate directions as to burden of proof, it is hard to see how the passage complained of could have been misunderstood to the prejudice of the accused. In any case, as their Lordships have pointed out, the critical examination of a summing-up is a matter for the Federal Court not for the Board.

For these reasons their Lordships have advised that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.; Stephenson, Harwood & Tatham.*